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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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Petitioner's reply to respondent's argument under Subdivision A of Point I of its brief and argument.

Counsel for the respondent has questioned the absence of the Petition for Leave to Appeal, filed in the Supreme Court of Illinois, from the transcript of record which has been filed in this Court. Under paragraph one of Rule 38 of this Court, a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed, must be filed. The record

in its technical sense is made in the trial court as was done in this case and brought up to the Appellate Court of Illinois by writ of error. The proceedings in the Appellate Court of Illinois, together with this record, are included in the transcript filed in this Court.

The absence of the Petition for Leave to Appeal from the record as it has been filed in this Court is further justified, if justification be necessary, on the ground that the issues raised therein are immaterial to this Court's jurisdiction.

We are seeking a review, not of the decision of the Supreme Court of Illinois, but of the decision of the Appellate Court of Illinois, First District, and the record affirmatively shows that a federal question arising under the National Banking Act was presented to the Appellate Court; that the decision of that question was necessary to a determination of the cause—the special pleas and affidavit of merits squarely raised the issue—and the judgment could not have been given without deciding the issue.

The opinion of the Appellate Court shows that these questions were judicially determined by that Court, and in view of the refusal of the Supreme Court of Illinois to take jurisdiction of the cause, the decision of the Appellate Court upon the federal questions presented in the record, necessarily becomes the final adjudication in the State upon such federal questions. It should be noted that this Court has said that under the Illinois practice, the refusal of the Supreme Court to assume jurisdiction is tantamount to an affirmance of the decision of the Appellate Court of Illinois.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410

No specific reason is given by the Appellate Court of Illinois (and none is required by statute) for its denial to grant petitioner's prayer for Leave to Appeal. However, the order of the Supreme Court of Illinois (Record p. 53), clearly shows that it considered the case as presented by the petition, record, abstract, brief and argument of the petitioner, and that upon due consideration thereof, the Court denied the Leave to Appeal. The element which confers jurisdiction upon this Court to issue its writ of *certiorari* as prayed, is the *denial* of the Leave to Appeal by the Supreme Court of Illinois.

American Railway Express Co. v. *Levee*, 263 U. S. 19, 21.

The case of *Lynch* v. *New York, ex rel. Pierson*, 79 L. ed. Adv. Op. 1, cited in respondent's brief at page two, is entirely without application. In that case, this Court was asked to review the decision of the New York Court of Appeals, which was the highest court in the State of New York, and from that decision it could not be determined that the court had decided the case on a federal or non-federal question.

In the case at bar, we are seeking to obtain a review of the decision of the Appellate Court of Illinois, which has become the decision of the highest Court of the State of Illinois, so far as this cause is concerned. As we have stated before, we are not seeking a review of the decision of the Supreme Court of Illinois. The essentials of the jurisdiction of this Court to review the decision of the Appellate Court of Illinois have been met.

Petitioner's reply to respondent's argument under Subdivision B of Point I of its brief and argument.

It is contended by the respondent under this subdivision of its argument that the petitioner did not pursue the

proper method of invoking the jurisdiction of the Supreme Court of Illinois; that had another method been employed, the State Supreme Court might have assumed jurisdiction, and that, therefore, this Court has no jurisdiction.

A sufficient and complete answer to this contention is found in the fact that the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal shows that the State Court had considered the petition, record, abstract, brief and argument filed by the petitioner and overruled the prayer thereof, denying "a Leave to Appeal" (Rec. p. 53). Had the petitioner herein pursued the wrong method in seeking to invoke the jurisdiction of the State Supreme Court as claimed by the respondent, the Petition for Leave to Appeal would have been *dismissed without consideration* and not denied after a consideration of the petition, record, abstract, brief and argument, as shown by the order of the said Supreme Court of Illinois.

We repeat as applicable here what we have already said in reply to respondent's argument in sub-section A of Point I of its brief, namely, that the jurisdictional element with which this Court concerns itself in applications for writs of *certiorari* is the *refusal* of the highest state court to take jurisdiction.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410

American Railway Express Co. v. *Levee*, 263 U. S. 19, 21

An analysis of the cases cited by respondent in support of its contention that this Court has no jurisdiction of

this case will instantly reveal that they are without application to the case at bar.

In *Mullen* v. *Western Springs Beef Co.*, 173 U. S. 116 (cited in respondent's brief as 123 U. S. 116), this Court held that it had no jurisdiction to review the decision of the Court of Appeals of Colorado.

It appears in that case that the Supreme Court is the highest court in the State and that it had jurisdiction to review the decision of the Court of Appeals had an application for such review been made to it; and that no such application had, in fact, been made. Clearly, this Court could not have reviewed the decision of the Court of Appeals, because it had not yet become the decision of the highest court in the State of Colorado from which one could have been had.

The case of *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, is one wherein this Court dismissed a writ of error for the reason that no federal question had been presented to the Supreme Court of South Carolina, whose judgment this Court was asked to review.

It appears that in the *Mims* case, the trial court had rejected an offer of certain evidence which raised a federal question. The State Supreme Court sustained that ruling and it is this decision sustaining the trial court that the defendant sought to have this Court review on writ of error. Under the pleadings in the case, no federal question had been raised and the offer of evidence was made at the second trial, after the plaintiff had completed her case.

Clearly, no federal question was decided either by the trial court or the Supreme Court of South Carolina. The sole question decided by the Supreme Court of South Carolina was one of the local law governing procedure.

This Court properly refused to review a decision on such a question.

In the case of *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, a writ of *certiorari* was prayed for the purpose of reviewing the decision of the Supreme Court of Missouri. This court dismissed the writ on the ground that no federal question had been presented to or decided by said Supreme Court of Missouri.

The facts in the case show that a question arising under the Constitution of the United States was raised for the first time in the appellate court, an intermediate court, in the defendant's brief and argument. The Supreme Court of Missouri held that the question was not properly raised under the law of Missouri and thus, like the Supreme Court of South Carolina in the *Mims* case, decided a question of procedure under local law and not a federal question.

Finally, the respondent cites and quotes from the case of *Newman* v. *Gates*, 204 U. S. 89, wherein this Court dismissed a writ of error to the Supreme Court of Indiana to review a decision of that Court which was that an appeal from the trial court to the appellate court, an intermediate court, was insufficient.

Again this Court properly held that it had no jurisdiction to review the decision of the Supreme Court of Indiana for the reason that it was based not upon a federal question, but purely on a matter of procedure under the local law of Indiana.

In none of the foregoing cases was a federal question decided by the Court whose decision this Court was asked to review. In the case at bar, as we have already pointed out, we are asking this Court to review a decision of the Appellate Court of Illinois, which squarely decided a federal question and which, by the Supreme Court's denial

of Leave to Appeal, became the decision of the highest court in the State of Illinois from which a decision of such federal question could be had.

Petitioner's reply to respondent's argument under Subdivision C of Point I of its brief and argument.

In spite of the fact that counsel for the respondent has attempted to minimize the importance of the federal questions involved in this case, we believe it to be apparent to this Court that a construction of the privileges and immunities of a national bank under the National Banking Act are matters of substance and that the questions here involved, namely, the validity of the repurchase agreement and the liability of a national bank upon an implied assumpsit for moneys obtained under an *ultra vires* contract, are of sufficient importance to warrant a review by this Court of the decision of the Appellate Court of Illinois.

Petitioner's reply to respondent's argument under Subdivision D of Point I of its brief and argument.

Under this subdivision of the respondent's brief and argument, the cases of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554 (*certiorari* denied by this Court, 291 U. S. 660), and *Cassatt, et al.* v. *First National Bank of West New York*, (N. J.), 168 Atl. 585 (*certiorari* denied by this Court, 291 U. S. 660), are cited to show that the decision of the Appellate Court of Illinois in the case at bar is in accord with the applicable decisions of this Court.

The *Knass* case, *supra*, 354 Ill. 544, cannot be deemed as a decision of this Court since it was dismissed for want

of a substantial federal question, nor is it applicable to the case at bar, as we will show the Court in another branch of our reply argument.

The *Cassatt* case, *supra*, 168 Atl. 585, is distinguishable for the reason that no specific authority was or is granted to a national bank to deal in stocks, as the New Jersey Court pointed out in its opinion on page 587 of the Atlantic Reporter. In the case at bar the National Banking Act grants express authority to the respondent to deal in bonds.

The *Pottorff* case, *supra*, 291 U. S. 245, cannot, by any stretch of the imagination be deemed as an authority on the question of whether the repurchase contract sued on in the case at bar is *ultra vires*, because there are no factual resemblances between the two cases. It cannot be considered as authoritative on the question of the petitioner's right of recovery upon an implied assumpsit theory, because this Court held, in effect, that even if a recovery of benefits were allowed to the complainant in that case, it could not recover the full amount of its deposit as a preference, but could share only as a general creditor of the defunct bank. We concede, as this Court said in its opinion, that no theory of estoppel could prevent the bank from raising the defense of *ultra vires* where it had no power to do the act complained of, and also that no rights arise out of an *ultra vires* contract. However, neither principle is even remotely involved in this case nor are we relying upon them.

Petitioner's reply to respondent's argument under Point II of its brief and argument.

In support of the argument made by counsel for the respondent on this branch of the case, several cases are

cited which we respectfully submit are not applicable to the case at bar and cannot be taken as authorities for the proposition that the repurchase agreement, sued on in this case, is *ultra vires.*

In the case of *Weckler* v. *First National Bank,* 42 Md. 585, the act of the National Bank, which was declared to be *ultra vires,* was the selling of bonds *as a broker on commission.* In *Hotchkin* v. *Third National Bank of Syracuse,* 219 Mass. 234, the National Bank contracted *on behalf of a client* to sell *stock* to the plaintiff, and in *First National Bank, etc.* v. *Hoch,* 89 Pa. St. 324, the National Bank there involved undertook to act as a *broker* for a client in the purchase of certain bonds.

It must be noted that in each of the cases above cited, the National Banking Act, as it then existed, did not permit, and the courts so held, national banks to act as brokers for the purchase or sale of stocks and bonds. It follows, therefore, that these cases are not analogous to the case at bar where, on the record, the respondent was acting *in its own behalf* and not as an agent or a broker for any other person.

The case of *Greene* v. *First National Bank,* 172 Minn. 310, was one wherein, prior to the 1927 amendment to the National Banking Act, a national bank agreed with a purchaser of a mortgage, to repurchase it. Under the Act as then in force, a national bank was not authorized to buy investment securities or to sell them, except that under limited circumstances it could act as a broker in selling real estate mortgages. With these facts before the Court, we respectfully submit that the repurchase agreement in the *Greene* case was *ultra vires,* not because it created a guaranty of the mortgage, nor because it created a contingent liability, the sudden maturity of which might em-

barrass the bank, *but solely because the bank had no authority to buy the security.*

Like the *Greene* case, *supra,* 172 Minn. 310, the facts of the *Knass* case, *supra,* 354 Ill. 554, show that the Illinois Banking Act (Smith-Hurd Illinois Statutes Annotated, 1935, chapter 16½, section 1), did not expressly authorize the defendant bank to buy or sell bonds or any other investment security, so that the defendant did not have any power under its charter to purchase the bonds from any one, including the plaintiff, in that case. The repurchase contract was *ultra vires* because of no authority to purchase the bonds and not because the contract constituted a guaranty.

We pointed out to this Court in our original brief that under the National Banking Act, as amended in 1927, the respondent had the express authority to buy and sell investment securities, so that the reason for declaring *ultra vires* the contracts in the *Greene* and *Knass* cases, *supra,* does not exist in the case at bar.

Counsel for the respondent in his reply brief stated that the provision in the National Banking Act is as far reaching and comprehensive as the Illinois Banking Act. We have already pointed out the vital difference between the two statutes.

It is true that the National Banking Act qualifies the power of a national bank to buy and sell investment securities. As counsel for the respondent points out, these transactions must be "without recourse." We respectfully submit that the sale of the bonds by the respondent to the petitioner was a sale "without recourse."

We pointed out in our original brief that the language of the repurchase contract in no wise conditions the respondent's liability upon the default in payment by the maker of the bonds.

We also pointed out to the Court in our original brief that on the record in this case the respondent owned the bonds which it sold to the petitioner, and counsel for the respondent admits this fact in his brief (see page 18). When the sale of the bonds was consummated, cash was substituted for the bonds, among the assets of the bank. When called upon to repurchase these bonds, the bank would then substitute the bonds for the cash it originally received. They would again resume their places among the bank's assets in lieu of the cash. Each party by this transaction would be placed in *statu quo*. The original sale to the petitioner was a completed sale, subject to defeasance, a condition of sale.

Counsel for the respondent in answer to this argument says in his brief that the *Knass* case, *supra*, 354 Ill. 554, is conclusive that this transaction was not a conditional sale, but we respectfully submit that the case is not conclusive on this point.

From the opinion in the *Knass* case (pp. 568, 569), it appears that the bank in selling the bonds had acted as a broker; the Court said: "The fact that the bank may have received a commission for selling them in no wise renders the mortgage bonds obligations of the bank," and "it will be presumed that the mortgagor, • • • received the amount paid by the claimants (complainants in the case) less commissions charged for the sale." One does not receive a commission for selling his own property. Thus, acting only as a broker or agent for the maker of the bonds who receives the purchase price, the bank, if called upon to repurchase the bonds, would be, in fact, called upon to buy bonds which it had never owned, the original purchase price for which it had never received. The situation would not be that of placing parties in *statu quo*.

The only person who could make a conditional sale under the circumstances of the *Knass* case, would be the maker of the bonds who received the consideration therefor and in whose behalf the sale was made.

The *Knass* case thus distinguished, it must clearly appear that the cases relied upon by us in our original brief as establishing our transaction as a conditional sale were not overruled by the *Knass* case, because in each of those cases, the seller was acting for its own account and not as a broker.

The Supreme Court of Illinois in its decision considered what it deemed as dangers to which the financial structure of a bank and its depositors would be subjected if a bank were permitted to enter into repurchase agreements which create contingent liabilities against which the bank is powerless to protect itself. Counsel in his brief repeats the same ideas and paints a dark picture. The dangers are more apparent than real.

Any bank selling its own bonds with an agreement to repurchase them, obtains the value of the bonds in cash and, as we have already pointed out, by performing its repurchase agreement it is merely placed in *statu quo*. The bank knows that it may be called upon to perform its contract and to repurchase the bonds, and is in a position to protect itself by setting up a reserve against such a contingency. Reserves are established against losses on bad loans and against depreciation of its fixtures and real estate, so that as a matter of actual practice and good banking, it could also protect itself against the contingency of repurchasing the bonds which it had sold. If, at the time it was called upon to repurchase the bonds, their value may have dropped, the bank's position is no worse than if it had not sold them in the first instance, or if it

had contracted to buy bonds and before their delivery their value had fallen.

The dangers thus depicted by the Supreme Court of Illinois and by counsel for the respondent may be reason for the legislature forbidding the banks to buy or own investment securities or to withhold from them the authority to do so, as in fact the Illinois legislature has done, but where Congress has authorized national banks to buy and sell and thus own securities, these apparent dangers are not valid reasons for denying to the bank the power to repurchase bonds which it once owned and which were sold in reliance upon the repurchase contract. We repeat that the power to so repurchase under such circumstances is a necessary incident to its power to sell.

We respectfully submit that the repurchase agreement sued on in this case was within the power of the respondent to make.

Petitioner's reply to respondent's argument under Point III of its brief and argument.

We have argued in our original brief that the repurchase agreement was not *ultra vires* in the sense that the respondent had *no* authority to enter into a contract of this character, but that *assuming* the agreement to be *ultra vires*, it could be so only in the sense that the bank had exercised a granted power excessively or abusively, and that under those facts it could be estopped to plead the defense of *ultra vires* since it had received the benefits of the contract.

In reply to this argument, counsel for the respondent has cited a long list of cases which hold that where a corporation has no authority to do a particular act, it cannot be estopped to plead that want of authority.

We respectfully submit that these cases and the rule laid down by them cannot control the case at bar because, as we have pointed out, the respondent had the power to buy and sell the bonds in question, and that at the most the sale with a repurchase agreement was an abuse of the granted power, and that since the respondent has received and does not offer to return the benefits of such contract, it is estopped to plead the defense of *ultra vires*.

Petitioner's reply to respondent's argument under Point IV of its brief and argument.

We now consider the answer of the respondent to our argument that even if it should be held that the respondent had no power or authority to make the repurchase agreement here in question, the Appellate Court of Illinois erred in its judgment by failing to remand the cause to the trial court in order to permit a recovery by the petitioner of the money paid by him in reliance upon the void agreement.

It is argued by the respondent that the petitioner is attempting to recover the purchase price paid for the bonds without returning them and after investment securities have greatly declined in value. Our reply to this statement is that the record does not show that the petitioner is seeking the return of his money without tendering the bonds to the respondent.

In order for the petitioner to recover the purchase price paid for the bonds in reliance upon the repurchase contract, he must prove a cause of action under his common counts and one element of that cause of action would be a tender or a willingness to return the bonds to the respondent.

Counsel for the respondent clouds the issue when he argues that the petitioner is attempting to get back money paid by him for bonds after the values of investment securities had greatly declined. There is nothing in the record of this case as to the value of the bonds in question, and what security values in general are, is of no importance. The value of these particular bonds is also of no importance *if when the petitioner paid $35,000 to the respondent, he did so in reliance upon a void agreement as the record shows the petitioner did.*

The cases which we have cited in our original brief counsel characterizes as involving questions of unjust enrichment, where a corporation has obtained money or property on its own void obligation. The facts in the case at bar bring it directly within the principle stated by counsel for the respondent. It makes no difference, however, whether the respondent sold obligations of another corporation, automobiles or any other chattel, so long as the petitioner was induced to part with his money on the strength of a void agreement, as the record in this case shows that the petitioner did.

Counsel also points out that there is no allegation that the respondent realized any profit resulting from the sale of the bonds to the petitioner. We respectfully submit that the petitioner is not attempting to recover any profit. The cause of action under the common counts is to recover the moneys paid to the respondent in reliance upon an alleged void agreement. "Benefits" and "profits" are not synonymous.

The argument upon which counsel places the greatest emphasis in an effort to defeat any right of recovery upon an implied assumpsit is that the affidavit filed by the petitioner with his declaration purports to restrict his cause of action to a recovery upon the express contract.

In support of this contention, counsel has cited several cases which we believe do not establish the principle for which counsel argues.

Before we consider these cases, we wish to call to this Court's attention that this case was before the Appellate Court of Illinois on two occasions: First, upon an appeal by the petitioner, and, second, upon a writ of error sued out by the respondent.

On the first appeal, the Appellate Court held that the repurchase agreement was not *ultra vires*, and that even if it was, the petitioner could have recovered, upon an implied assumpsit, the moneys he had paid to the respondent in reliance upon the *ultra vires* contract. *Awotin v. Atlas Exchange National Bank, etc.*, 265 Ill. App. 238.

On this first appeal, the respondent urged that there could be no recovery on the implied promise for the reason that the plaintiff's affidavit of claim showed that his cause of action or demand was based upon the written contract. The Appellate Court rejected this argument and said:

> "But defendant's counsel contends that there can be no recovery by plaintiff in this case. Under an *implied* promise or agreement, '*where the verified statement of claim* alleges an *express* promise.' Counsel refers to that portion of plaintiff's 'affidavit of amount due,' as above set forth, wherein plaintiff states that his demand is 'for $37,085.41 • • • *under its written agreement, dated Nov. 1, 1929,*' etc. In support of his contention counsel cites certain Appellate Court decisions. But we think that plaintiff's declaration, in which are included the common counts, is sufficient to warrant a recovery under an implied promise • • •. If counsel's contention be a good one,

in those cases where an affidavit of claim has been filed by a plaintiff with his declaration and an affidavit of merits by a defendant with his plea, the result would be that such cases would be tried, as said in *Cox* v. *Aetna Cas. & Surety Co.*, 261 Ill. App. 394, 399, 'upon the issues made by the affidavits instead of by the pleadings.' In our opinion there is no merit in counsel's contention."

When the Appellate Court had the case before it on the second appeal, it completely reversed its stand on this proposition, saying:

"Plaintiff's counsel also contends that 'even if it be considered that the bank in making the repurchase agreement acted *ultra vires*, plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit*.' It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *assumpit* after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Pottorff* case, *supra*, it is the settled doctrine of the Supreme Court of the United States that 'no rights arise on an *ultra vires* contract even though the contract has been performed.' This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra*, (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* 'without tendering to plaintiff the money defendant received from plaintiff' is equally without merit."

It seems quite apparent that if the Appellate Court had believed that the substantive law would have permitted the petitioner to recover on the implied assumpsit, it would not have reversed its former ruling on the procedural question. The Court, however, relying upon the case of *Texas & Pacific Railway Co.* v. *Pottorff, supra,* 291 U. S. 245, held that as a matter of substantive law the petitioner could not recover upon the implied promise and, consequently, its ruling on the procedural question was merely gratuitous. We have heretofore pointed out to this Court that nothing in its opinion in the *Pottorff* case could be deemed to prevent a recovery upon the implied contract theory.

We will briefly review the cases upon which counsel for the respondent relies in support of his contention that the petitioner is barred by his affidavit of claim from recovering upon the implied contract theory.

In *Keime* v. *Thum,* 238 Ill. App. 519, the plaintiff's cause of action was based solely upon the consolidated common counts in *indebitatus* assumpsit; in the affidavit of claim, plaintiff stated the facts upon which his cause of action was based, namely: The quantity of corn sold and delivered by the plaintiff to the defendant, the price per bushel and the agreement of the defendant to pay the said price. At the trial, plaintiff did not testify that the defendant had agreed to pay the price alleged in the affidavit. The Court said that by the plaintiff's affidavit of claim, the otherwise general common counts were limited to the facts set out in the affidavit and legal proof of them was necessary in order to support a recovery. The plaintiff, the Court held, failed to make this proof.

The facts in *Goddard Tool Company* v. *Crown, etc., Company,* 219 Ill. App. 34, show that the plaintiff's case was predicated upon a single count in special assumpsit supported by an affidavit of claim.

In *Cooper* v. *Anderson*, 264 Ill. App. 1, the Court used the language quoted by counsel for the respondent in its ruling that the affidavit of the parties so limits the issues in a case that a plaintiff need not prove averments in his affidavit which are not denied by the defendant's affidavit of merits, which admits all facts not denied.

The language of the case of *Reddig* v. *Looney*, 208 Ill. App. 413, quoted by counsel for respondent was used by the Court in deciding that under the Illinois Practice Act, under Section 55 of the Illinois Practice Act of 1907, defenses not alleged in the affidavit of merits are waived.

The case at bar presents a record entirely different than the facts in any of the foregoing cases.

It is the most elementary rule of pleading that the allegations in a declaration or in a plea control the right of recovery or the defense relied upon.

It is likewise elementary that each count is in itself a declaration, and that although two or more counts may be joined in a single cause of action, each count, nonetheless, remains a declaration.

With these principles before the Court, we look to the case at bar and find that the petitioner joined in his action against the respondent two causes of action: One for the breach of an express contract and the other for the breach of an implied contract.

It is important to note that the purpose of such joinder of causes of action is to permit a plaintiff to recover in general assumpsit anything to which, at the trial, he may have proved himself entitled, if for some reason he cannot recover upon the express contract. In short, when the common counts are joined with a special count, they act as a catchall in order to permit a recovery if the plaintiff proves any cause of action in assumpsit. 5 Corpus Juris 1399.

It is true that in the case before the Court, the affidavit of claim states that the petitioner's demand is upon a written contract, but this affidavit applied only to the petitioner's demand under the special count. In other words, the affidavit was filed to the special count alone, and there was no affidavit filed to the common counts. To hold otherwise, would be to render nugatory the very purpose of joining common and special counts. It would permit pleadings to be controlled by affidavits to an extent not contemplated by the statute (Cahill's Illinois Revised Statutes, 1931, Chapter 110, Section 55) when we consider that its purpose is to aid plaintiffs and relieve them from the delay occasioned by defendant's pleading sham defenses. *Harrison* v. *Rosehill Cemetery Company*, 291 Ill. 416, at 419, 420; *Haggard* v. *Smith*, 71 Ill. 226, *Cooper* v. *Anderson*, 236 Ill. App. 1, 5; *Reddig* v. *Looney*, 208 Ill. App. 413, 416.

The purpose of the statute being as we have stated, the affidavit of plaintiff's claim is construed as being evidenciary in character, that is, it supplies the evidence upon which the court may enter a judgment if a defendant fails to appear or to plead, or if he pleads, then if he fails to file an affidavit of meritorious defense. *Keator, etc. Co.* v. *Thompson*, 144 U. S. 436; *Kern* v. *Strasberger*, 71 Ill. 303, 305; *Silliman* v. *Nowlan*, 271 Ill. App. 484, 493.

We respectfully submit that the petitioner is not barred from recovering under his common counts the money paid by him to the respondent in reliance upon the alleged *ultra vires* contract.

CONCLUSION.

We have shown to this Court that it has jurisdiction to issue its writ of *certiorari* herein; that the repurchase agreement is not *ultra vires*, but that it is within the express powers of the respondent as granted by the National Banking Act; that at most the repurchase agreement can be deemed only to be an abuse of the express powers of the respondent, who is estopped to plead the defense by reason of the fact that it has received and retained the benefits of the transaction; and, finally, we respectfully submit that we have shown to the Court that even assuming the repurchase agreement to be *ultra vires*, the petitioner is nonetheless entitled to recover from the respondent the purchase price of the bonds purchased by him in reliance upon such alleged *ultra vires* contract. We, therefore, pray that this Honorable Court issue its writ of *certiorari* directed to the Appellate Court of Illinois, First District, for the purpose of reviewing the decision of said Appellate Court.

Respectfully submitted,

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